

**UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
OAKLAND DIVISION**

EPIC GAMES, INC.,
Plaintiff, Counter-defendant,
v.
APPLE INC.,
Defendant, Counterclaimant.

Case No. 4:20-cv-05640-YGR-TSH

JOINT STATUS REPORT

The Honorable Thomas S. Hixson
San Francisco Courthouse
Courtroom E - 15th Floor
450 Golden Gate Avenue
San Francisco, CA 94102

Dear Magistrate Judge Hixson,

Pursuant to Your Honor's Discovery Standing Order, the Parties in the above-captioned action respectfully submit this joint statement related to the ongoing evidentiary hearings concerning Plaintiff Epic Games, Inc.'s ("Epic") Motion to Enforce Injunction (Dkt. 897 (the "Motion"))).

Respectfully submitted,

CRAVATH, SWAINE
& MOORE LLP

WEIL, GOTSHAL & MANGES LLP

By: /s/ Yonatan Even
Yonatan Even
Counsel for Epic Games,
Inc.

By: /s/ Mark A. Perry
Mark A. Perry
Counsel for Apple Inc.

Epic’s Position: On August 8, 2024, Apple was ordered to substantially complete document production by September 30, 2024—less than three weeks from today. (Dkt. 1008 at 2.) Apple committed to doing so on a rolling basis. (See Dkt. 1001 at 3 (“Apple is working diligently on rolling document productions in this matter.”); Dkt. 1004 at 3 (“Apple will review and produce documents on a rolling basis . . .”).) Apple has utterly failed to live up to these commitments. And while Apple has made a modest production on the eve of this Joint Status Report, **Apple has not made any significant document production to date.**

Both before and since the Court’s discovery hearing on August 8, 2024, Epic repeatedly raised the concern that Apple would backload its productions rather than rolling its productions as it committed to do, so as to further delay the contempt proceeding against it. For example:

- In Epic’s portion of the July 17 Joint Status Report, Epic pointed out that “Apple still has not even confirmed that its review has *begun*”, and therefore “Epic continues to have serious concerns about Apple’s delay of the production process”. (Dkt. 1001 at 2.)
- In Epic’s portion of the July 31 Joint Status Report, Epic again stated that “Apple has not produced a single document pursuant to the ‘stage two’ production the Parties have agreed to. Epic therefore continues to have serious concerns about Apple’s delay of the production process . . . [and] reiterates its request for the Court to order Apple to move the process along”. (Dkt. 1004 at 2.)
- In Epic’s portion of the August 14 Joint Status Report, Epic noted that “[a]ll parameters affecting Apple’s search protocol have now been resolved”, yet “Apple continues to drag its feet”, indicating that “Apple has no intention of facilitating such an efficient, orderly [rolling production] process, but instead intends to “dump” most or all of its production at or close to its substantial completion deadline.” (Dkt. 1011 at 2.) In response, even after the Parties’ agreed-upon exchange schedule for these status reports, Apple finally produced 210 documents—a nominal amount given the amount of documents Apple has identified as potentially responsive.
- In Epic’s portion of the August 28 Joint Status Report, Epic again raised its concern that “Apple will dump virtually all of its document production into the final month of the discovery period—an entirely backloaded production . . . Apple’s foot-dragging has been and continues to be clearly calculated to delay Epic’s ability to review Apple’s production and, ultimately, to delay the adjudication of Apple’s non-compliance with the Court’s injunction.” (Dkt. 1013 at 2.)

In each of these Joint Status Reports, Apple repeatedly claimed it is “working diligently” to “promptly” meet its production obligations. Indeed, in the Parties’ most recent Joint Status Report, dated August 28, 2024, Apple represented to Epic and the Court that “it intends to make its next robust production in the coming days” and “anticipates it will make at least three rolling productions by the Court’s substantial completion deadline of September 30, 2024”. (*Id.* at 3.)

Apple has not followed through on its representation. **Apple did not make any production in the two weeks following the August 28 Status Report, “robust” or otherwise.**

Yesterday, the Parties had agreed to exchange the final versions of their respective portions of this Joint Status Report at 4:00 pm PST. Four minutes prior to that exchange deadline, Apple asked to push the exchange by one hour, to 5:00 pm PST. At 4:37 pm PST, Apple made a production of documents, which—based on Apple’s representation below—comprises 6,500 documents. Given the timing of this production, Epic has not had a chance to analyze the production. In any event, to place this production in perspective, Apple has for months represented that it had identified approximately 650,000 server-side documents as potentially responsive and expected that number to grow significantly once Apple completed its custodial interviews. Epic fully expects that Apple’s ultimate production will comprise many tens of thousands of documents, if not more. Given these numbers, a production of only 6,500 documents is neither robust nor significant.

Judge Gonzalez Rogers ordered Apple to produce “all of [its] documents relative to its decision-making process” on May 31, 2024. Yet now, more than three months later, and only a few weeks before the Court-mandated substantial completion deadline, Apple has not made any significant document production. Apple has produced fewer than 1,500 documents until yesterday, and roughly 8,000 documents including yesterday’s production. This necessarily means Apple will dump the vast majority of responsive documents shortly before or on the substantial completion deadline. In doing so, Apple has reneged on its commitments and representations to Epic and to this Court. Apple is thus not complying in good faith with the Court’s orders.

Apple’s Position: Apple continues to move forward expeditiously with reviewing documents for production.

Custodians and Document Collections. The Parties agreed on 52 custodians. Hundreds of reviewers have been evaluating the custodians’ documents for relevance, privilege, and confidentiality. A large outside counsel team is dedicated to finalizing these reviews and readying the documents for production.

Phase Two Production. Epic claims that Apple did not make “any production in the two weeks following the August 28 Status Report.” That is false. On September 11, 2024, Apple made a rolling production of approximately 6,500 documents from 48 custodians after multiple interviews with many of them.

Epic nonetheless complains again that Apple has not made any “significant” production to date and that it is not making a good faith effort to comply with the Court’s orders. But Apple has made and is making significant progress towards the Court’s substantial completion deadline. Thus far, it has rolled two productions and expects to make two more by September 30, 2024. The number of documents Apple has produced is not indicative of the number of documents it has reviewed, given the broad search terms and custodian list insisted upon by Epic.

Epic also speculates that Apple sought to move the exchange of this Joint Status Report by one hour so that Apple could make a production of documents. Parties request—and grant the courtesy

of—extensions to accommodate all sorts of issues (personal and professional). For example, Epic requested an extra two hours to meet Tuesday’s exchange deadline, and Apple accommodated an extra two-and-a-half hours to exchange yesterday. Epic’s speculation about Apple’s motives is incorrect and inconsistent with the spirit of cooperation that has been prevalent despite the parties’ underlying differences.

Privilege logs. To the extent necessary, Apple will serve a privilege log in connection with its September 11 production within 10 days of the production, consistent with the Amended ESI Protocol (Dkt. 245).

Respectfully submitted,

DATED: September 12, 2024

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